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MEMORANDUM OF LAW

DATE: July 2, 2001

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Related to Appointment of Steven McWilliams to Medical Marijuana Task Force

INTRODUCTION

You have asked the City Attorney's Office to determine whether a conflict of interest would be created by the appointment of Steven McWilliams to the Proposition 215 Implementation Task Force, a medical marijuana task force. The potential conflict relates to Mr. McWilliams' pending civil lawsuit against the City, which involves the arrest of Mr. McWilliams for marijuana possession, and the confiscation of marijuana plants from Mr. McWilliams which he claims were possessed for medical purposes. This situation does not create a conflict of interest under the Political Reform Act, because members of the Medical Marijuana Task Force are not public officials subject to the Political Reform Act. The Attorney General's Office concurs in this conclusion. However, under the City's Council Policy Code of Ethics, Mr. McWilliam's personal and financial interest in the litigation may present a conflict of interest which would be incompatible with the performance of his duties on the Task Force. Additionally, Mr. McWilliam's appointment to the Task Force presents potential legal problems for the City Attorney's Office representative on the Task Force under the State Bar Rules of Professional Conduct.

BACKGROUND FACTS

Steven McWilliams is a citizen activist involved in the issue of the use and distribution of marijuana for medical purposes. In August 2000, Mr. McWilliams filed a lawsuit seeking damages from the City of San Diego related to his 1999 arrest by the San Diego Police Department for possessing marijuana plants, and the City's confiscation of the plants and some related equipment. In his lawsuit, Mr. McWilliams alleges that he should be compensated by the

City for the value of the plants and equipment, and for emotional distress. Mr. McWilliams is basing his request for compensation on the theory that the marijuana was possessed lawfully for medical purposes.

On May 22, 2001, the Mayor and City Council voted to form a task force entitled the "Proposition 215 Implementation Task Force" (Task Force). The purpose of the Task Force is to determine the most efficient way to regulate the use of medical marijuana in accordance with Proposition 215, the Compassionate Use of Marijuana Act of 1996. Twelve people were appointed to the Task Force, including Steven McWilliams. The Mayor and Council also directed that staff from the City Manager's Office, the City Attorney's Office, and the San Diego Police Department be assigned to work with the Task Force. The resolution approved by the Mayor and Council creating the Task Force states that the Task Force shall focus its efforts on the following tasks:

- (a) Investigate the existing local Proposition 215 advocacy network, determine whether information is readily available to eligible patient groups, and devise any additional means that may be needed for outreach;
- (b) Monitor local law enforcement efforts and the activities of the San Diego County District Attorney's Working Group;
- (c) Monitor medical research efforts germane to Proposition 215; and
- (d) Monitor and support legislative efforts at the state level that seek to help local governments in their efforts to respond to Proposition 215.

As a result of Mr. McWilliams' appointment to this Task Force, this Office has been asked to determine whether Mr. McWilliams' participation in the Task Force will present a conflict of interest because of his pending medical marijuana lawsuit against the City.

ANALYSIS

The conflict of interest authorities relevant to this situation are the Political Reform Act of 1974 and Council Policy 000-4. Additionally, this situation raises an issue related to State Bar Rule of Professional Conduct 2-100.

I. Political Reform Act of 1974

The Political Reform Act of 1974 [Act] codified at California Government Code sections 81000-91015, and California Code of Regulations, title 2, sections 18109-18997, was adopted to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests. Cal. Gov't Code § 81001. The Act applies only to "public officials," as that term is defined in Government Code section 82048. Section 82048 provides that "public official" means every member, officer, employee, or consultant of a state or local government agency. The term "member" is further defined in Section 18701(a)(1) of the California Code of Regulations, Title 2, to include salaried or unsalaried members of committees, boards, or

commissions with decisionmaking authority. A committee, board, or commission has decisionmaking authority when:

- (A) It may make a final governmental decision;
- (B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or
- (C) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

Cal. Code of Regs., tit. 2, §18701(a)(1).

Because the Task Force is an advisory body, not a decisionmaking body, and because it does not have a track record of having its recommendations approved by the City Council or City officials over an extended period of time, the members of the Task Force do not fit within the definition of “public officials” stated above. Therefore, as a member of the Task Force, Mr. McWilliams is not subject to the conflict of interest provisions of the Act.

II. Council Policy 000-4

San Diego City Council Policy 000-4, which is entitled “Code of Ethics,” was adopted by the City Council in 1967, for the purpose of setting standards of conduct for all elected officials, officers, appointees, and employees of the City. Because Council Policy 000-4 applies to appointees of the City, it is applicable to the members of the Task Force.

One pertinent provision of Council Policy 000-4 states:

No elected official, officer, appointee or employee of the City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

This provision of the Council Policy may be violated by Mr. McWilliams if he participates in the Task Force while his medical marijuana lawsuit against the City is pending. Because of the lawsuit, Mr. McWilliams has both a financial and a personal interest in the City’s policies and law enforcement standards on medical use of marijuana. His personal and financial interest in the City’s policies on this subject are incompatible with the proper discharge of his official duties on the Task Force, and these interests may also impair his independence or judgment in giving recommendations to the City on these issues.

Additionally, Council Policy 000-4 prohibits appointees from engaging in any enterprise or activity which shall result in “[u]sing official information not available to the general public for his private gain or advantage or that of another.” In the course of serving on the Task Force along with representatives from the Police Department and City Attorney’s Office, Mr. McWilliams would be in a position to obtain information which he would not otherwise have access to regarding City policies and practices related to drug enforcement and medical marijuana. In turn, Mr. McWilliams could use this official information to gain an advantage in his lawsuit against the City. Therefore, in addition to being incompatible with the proper discharge of duties, Mr. McWilliams’ dual roles of litigant and Task Force member are also problematic under the Council Policy because the situation poses a risk that his participation in the Task Force will result in his use of official information for private gain or advantage.

III. California State Bar Rule of Professional Conduct 2-100

In addition to the conflict of interest issues arising under Council Policy 000-4 described above, Mr. McWilliams’ participation in the Task Force poses a potential problem under the State Bar ethical rules for the City Attorney’s representative on the Task Force. The Rules of Professional Conduct set forth the standards for attorneys who are members of the State Bar for purposes of discipline. Rule 2-100(A) provides:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

One of the primary purposes of this ethical rule is to prevent statements made by the uncounseled party to an opposing attorney from being offered against that party as admissions in court. *Continental Insurance Co. v. Superior Court*, 32 Cal. App. 4th 94 (1995).

The City Attorney’s Office represents the City as a client in the matter of the McWilliams lawsuit, and has also been directed to assign a member of the office to work with the Task Force. The attorney assigned to the Task Force will necessarily communicate with Mr. McWilliams, both directly and indirectly, about the subject of the lawsuit, the medical use of marijuana.

Mr. McWilliams was represented by an attorney at the time he filed his lawsuit against the City, however, that attorney has withdrawn from the case. Another attorney has communicated with the City Attorney’s Office on Mr. McWilliams’ behalf regarding the lawsuit on several occasions, and has stated to members of the media that he intends to represent Mr. McWilliams in the lawsuit. It is unclear whether Mr. McWilliams is currently represented, or will be represented by an attorney at a future time. Additionally, it is unclear whether any attorney representing Mr. McWilliams in the lawsuit will be willing to consent to the City Attorney’s Office communicating with Mr. McWilliams outside the presence of his counsel on the subject of medical marijuana. Until these issues are settled, Mr. McWilliams’s participation

on the Task Force places the City Attorney representative on the Task Force at risk of potentially violating Rule 2-100.

CONCLUSION

Steven McWilliams' appointment to the Task Force, at the time of his pending medical marijuana lawsuit against the City, is not a violation of the Political Reform Act, but may present a conflict of interest under Council Policy 000-4, because of the incompatibility of the litigation with the objective performance of duties on the Task Force, as well as the potential for misuse of official information to gain advantage in the lawsuit. Additionally, a potential problem under the State Bar ethical rules may arise for the City Attorney's Office if Mr. McWilliams retains an attorney to handle his lawsuit. To avoid these potential legal problems, and to maintain a level playing field between the parties to the litigation, we recommend that Mr. McWilliams' appointment to the Task Force be rescinded until final resolution of the litigation. Ultimately, the decision to allow him to remain on the Task Force is a policy call for the Mayor and Council. If Mr. McWilliams dismisses his lawsuit, no conflict or issue would arise out of his service on the Task Force.

CASEY GWINN, City Attorney

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By

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